Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1150.

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

On Appeal From the Supreme Court of the State of New Jersey.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL.

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Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY AND RICHARD J. SULLIVAN, COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY,

Appellees.

—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY.

—

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL.

ARGUMENT.

Appellees' Motion to Dismiss the Appeal on the Ground That Same Does Not Present a Substantial Federal Question Should Be Denied.

In the "Counter-Statement of the Case" contained in Appellees' Brief in support of their motion to dismiss the appeal in the within matter, a lengthy excerpt from a statement entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management" is set forth verbatim. Appellees' apparent intention in quoting the excerpted passage is to present a factual nexus to legitimatize the adoption of *P. L.* 1973, *c.* 363 in the State of New Jersey. While the quoted material undoubtedly represented the official position of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management, at the time of its publication it can hardly be characterized as either factually undisputed or materially complete.

On November 8, 1973, the Commissioner of the New Jersey Department of Environmental Protection gave legal notice of the publication of proposed Rules of the Bureau of Solid Waste Management (Appendix N, A. 114). Appended to each copy of said proposed Rules was a statement entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management". Appellees filed a copy of said statement with the trial court as an attachment to an affidavit dated January 30, 1974, which affidavit was submitted by the Chief of the Bureau of Solid Waste Management for the purpose of opposing Appellants' application for an interlocutory injunctive order. The specific averment in said affidavit with respect to the

"Basis and Background" was on information and belief,[1] and did not conform with the requirements of *R.* 1:6-6 of the Rules of Court of the State of New Jersey:

> If a motion is based on facts not appearing of record, or not judicially noticeable the court may hear it on affidavits *made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify* and which may have annexed thereto certified copies of all papers or parts thereof referred to therein. The court may direct the affiant to submit to cross-examination, or hear the matter wholly or partly on oral testimony or depositions. (Emphasis added.)

Accordingly, the "Counter-Statement" presented by Appellees is not a competent statement of the case. Its evidential value should be considered by this Court only to the extent that it represents an admission against interest by a party to a civil action, *N. J. Rules of Evidence, Rule* 63(7).

A substantial portion of the quoted material deals with the *cost* of solid waste collection and disposal, and not as one might expect, with the potential for harm to public health and environmental quality. This is not surprising. According to a statement in the "Basis and Background" report not quoted by Appellees, collection and haulage of solid waste in New Jersey ". . . accounts for 75 to 85 percent of the total collection/disposal costs. . . ." Depletion of nearby disposal sites inevitably leads to increased cost.

1. Paragraph 9 of said affidavit reads as follows:
"The facts set forth in the Basis and Background document promulgated with the Department's proposed revision of solid waste management regulations are, upon information and belief, true."

In this context, Appellees are somewhat presumptuous when they present the question:

> "Does the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution require a state acting to fulfill its obligation to provide solid waste disposal facilities for its own residents also to provide such facilities for other states?"

The State of New Jersey provides no such facilities. Disposal sites, with few exceptions not material here, are owned and operated exclusively by private industry, and regulated by the State in the public interest, *N. J. S. A.* 13:1I-1 *et seq.; N. J. S. A.* 48:13A-1, *et seq.; N. J. A. C.* 7:26-1 *et seq.*

It has recently become fashionable in New Jersey to assert, without hesitancy or reservation, that a solid waste disposal crisis exists in the State, *Southern Ocean Landfill, Inc. v. Mayor and Council of the Township of Ocean,* 64 *N. J.* 190, 193 (1974); *Hackensack Meadowlands v. Mun. Landfill Auth.,* 64 *N. J.* 451, 460 (1975). However, there is a vast difference between rhetoric and fact. Appellees suggest a purported ". . . acute shortage of available landfill space within New Jersey" (Brief, p. 12) as being a clearly established fact. Yet, the principal environmental engineer of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management testified, under oath, that no effort has been made by the Department to calculate the total acreage available for sanitary landfill purposes in the State of New Jersey (Appendix O, A. 200); and an averment contained in an affidavit executed by two licensed professional engineers (Exhibit A, *infra*) stating that:

> "There is unlimited suitable available acreage in the State of New Jersey for sanitary landfill pur-

> poses which could be developed in accordance with existing and proposed regulations of the New Jersey Department of Environmental Protection."

has never been challenged by Appellees and is undisputed in the record.

Finally, there has been no showing whatsoever that the regulated importation of solid and liquid waste presents an inherent threat or serious potential for harm to public health or environmental quality. Indeed, quite the contrary has been established. The principal environmental engineer of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management acknowledged under oath that the Rules of the Bureau, *N. J. A. C.* 7:26-1 *et seq.*, were entirely adequate to protect the health, safety and welfare of the people of the State of New Jersey and the quality of its environment (Appendix O, A. 198). Although this admission has been repeated time and time again in briefs and arguments before the trial court and the New Jersey Supreme Court, its accuracy has *never* been challenged by Appellees, who had countless opportunities either to clarify or to refute the statement.

CONCLUSION.

It is respectfully urged that Appellees' motion to dismiss the appeal for lack of a substantial federal question be denied.

Respectfully submitted,

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EXHIBIT A.

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY—LAW DIVISION
Docket No. L-15068-73 P.W.
Civil Action

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AFFIDAVIT

CITY OF PHILADELPHIA, ETC, ET AL.
Plaintiffs

v.

STATE OF NEW JERSEY, ET AL.
Defendants

STATE OF NEW JERSEY }
COUNTY OF MERCER } ss.:

RICHARD A. PELUSO and DENNIS G. FENN, being duly sworn upon their oaths, according to law, depose and say:

1. I, Richard A. Peluso, am a professional engineer licensed to practice in the State of New Jersey.

I, Dennis G. Fenn, am a civil engineer practicing in the State of New Jersey.

2. I, Richard A. Peluso, hold a master's degree in Environmental Engineering and have completed almost all course work toward a doctor's degree in said field, and have had in excess of five years experience in the field of solid waste management.

I, Dennis G. Fenn, hold a master's degree in Environmental Engineering and have over three years experience in the field of solid waste management.

3. In the event plaintiffs are required to remove solid waste previously disposed of in a sanitary landfill facility it would be necessary to open a face in the landfill, which would seriously increase the potential danger to both the health of the residents of the State of New Jersey and the quality of the environment of said State.

4. The principal hazards precipitated by such removal includes a proliferation of leachete, vermin and rats, and the creation of serious odor problems.

5. There is unlimited suitable available acreage in the State of New Jersey for sanitary landfill purposes which could be developed in accordance with existing and proposed regulations of the New Jersey Department of Environmental Protection.

6. A typical sanitary landfill site consisting of 200 acres, and operated in compliance with the regulations of the New Jersey Department of Environmental Protection would remain fully operational to dispose of 10,000 tons of solid waste per week for a period of approximately 15 years.

RICHARD A. PELUSO
Richard A. Peluso
DENNIS G. FENN
Dennis G. Fenn

Sworn to and Subscribed before me this 31st day of January, 1974.

FLORENCE MASSEY
Florence Massey
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 16, 1977

CERTIFICATE OF SERVICE.

I hereby certify that on this 26th day of March, 1976, three copies of this Brief in Opposition to Appellees' Motion to Dismiss the Appeal were mailed, with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey 08625; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey 07080; to David N. Samson, Esquire, attorney for defendants-respondents in the companion case Hackensack Meadowlands v. Mun. Landfill Auth., A-81 (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey 07052; and to William C. Brashares, Esquire and Paul M. Laurenza, Esquire, Cladouhos & Brashares, attorneys for movants for permission to file a brief as Amicus Curiae, National Solid Wastes Management Association, at their law offices located at 1750 New York Avenue, N.W., Washington, D. C. 20006.

I further certify that all parties required to be served have been served.

by: Arthur Meisel
Arthur Meisel